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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE ROBERTO CASTRO,

Defendant and Appellant.

G055264

(Super. Ct. No. 16CF2656)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Cheri T. Pham, Judge. Affirmed in part and reversed in part, and remanded for resentencing.

Sheila O'Connor, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Steve Oetting and Matthew Mulford, Deputy Attorneys General, for Plaintiff and Respondent.

Jorge Roberto Castro was convicted of one count of committing a forcible lewd act on a child (his daughter, K.C.) under the age of 14, and one count of assault with intent to commit a sexual offense against her. Both offenses occurred after Castro followed K.C. into the bathroom in the family home at approximately 2:00 a.m., using his foot to prevent her from closing the door to keep him out. The first count pertains to his fondling of her breasts, and the second to his attempt to make her remove her pants.

Castro argues his conviction on the first count must be reversed because there is insufficient evidence he employed force or duress in committing the lewd act of fondling K.C.'s breasts. While Castro concedes there is evidence he used force in connection with the effort to remove her pants, including evidence that K.C. screamed and cried, fought him off, and that he twice bit her, he contends the undisputed evidence establishes all of that occurred *after* he fondled her breasts.

We disagree. The two offenses occurred minutes apart, during a single incident in a locked bathroom. Castro's argument requires drawing a firm time line between his fondling of K.C.'s breasts, which he contends was completed before she made any effort to resist him, and his attempt to remove her pants. But he acknowledges the evidentiary record establishing that timing is "murky." Castro's acknowledgment concedes the point. Moreover, there is evidence, which he fails to account for, that amply supports the inference K.C. did not acquiesce in his fondling of her breasts.

But even if the evidence were insufficient to support the inference Castro used force to accomplish his fondling of K.C.'s breasts, we would conclude it supported a finding that he employed duress to coerce her submission to his advance. The evidence demonstrates not only that Castro forced his way into the bathroom with then 12-year-old K.C. and locked the door, trapping her alone with him in the middle of the night, but also that she was aware he had a history of violence against other family members. When we add the additional facts that K.C. refused Castro's initial demand that she remove her top, that he did it anyway, and that she was openly screaming and crying within minutes, the

evidence strongly supports the inference that, if Castro did not use actual force in committing the lewd act of touching K.C.’s breasts, he accomplished it through duress.

In a supplemental brief, Castro also contends the court erred by sentencing him on the forcible lewd act count in accordance with the sentencing law that went into effect in 2010, rather than the sentencing law that was in effect in 2009. The Attorney General concedes the point, and we agree. We consequently reverse Castro’s sentence on the first count and remand the case to the trial court for resentencing.

FACTS

Castro’s conviction arises out of an incident in 2009, when his older daughter, K.C., was approximately 12 years old. The children’s mother worked nights, and thus Castro was often home alone overnight with their four children: K.C.; her nine-year-old brother, J.C.; her seven-year-old sister, A.C.; and her baby brother, C.C.

The evidence pertaining to the incident, as described by Castro in his opening brief, is that “[o]ne night in 2009, when [his daughter, A.C.] was six or seven years old, she woke up in the morning, and saw her older sister, K.C., walk into the bathroom, with [Castro] following her, when he then put his foot in the door to stop her from shutting it. . . . [F]ive or ten minutes later, [A.C.] heard [K.C.] screaming from inside the bathroom, so she went and banged on the door to get her dad to open it. [Citations.] She woke up her nine-year-old brother [J.C.] to tell him, and he stayed with [the youngest child,] while she continued to knock on the door, begging the dad to open it, as she could hear K.C. screaming and calling for help. [Citations.] At some point, [J.C.] looked into the crack of the door where he could see K.C. sitting on the toilet, while [Castro] was on his knees sitting in front of her. [Citations]. [A.C.] thought she knocked on the door for about ten minutes, and that they were in there for about 15 minutes. [Citations.]”

“Finally, the baby [C.C.] woke up and started crying, so [Castro] eventually opened the door and came out, with all of his clothes on. [Citations.] As he did, [A.C.] and [J.C.] saw [K.C.] crying and putting on her bra and her shirt; just before [K.C.] buttoned up her shirt, [A.C.] noticed [K.C.’s] chest was red and her finger had been bitten.”

According to J.C.’s testimony at trial, those events occurred at approximately 2:00 a.m. A.C. testified at trial that she immediately went to K.C. after Castro walked out of the bathroom, and that K.C., who was still crying, described to her what had occurred. According to A.C., K.C. told her Castro “asked her to take off her clothes; and . . . to take them off slowly so he could have seen her.” K.C. said “no” to that request, but Castro prevailed in getting her top off, and he touched her on her bare breasts. A.C. testified that K.C. described her reaction to Castro’s actions as “really angry, and like, she couldn’t believe that he . . . was doing that to her.” She said K.C. also told her that Castro tried to get her pants off slowly, but she “defended herself.” K.C. told A.C. that she wanted to hit Castro, but he would not let her. Instead, when she tried to fight back, he bit her.

Although A.C. recalled seeing that K.C.’s fingers had been bitten, she did not recall during her testimony that the red mark she saw on K.C.’s chest was also a bite mark—a fact testified to by K.C.’s mother, who described the bite mark as “very close” to K.C.’s nipple.

Castro’s attack on K.C. was not immediately reported to police because Castro threatened to harm J.C. with a knife if any member of the family made such a report. And when the children’s mother arrived home some hours later, and she nearly fainted upon learning from them what Castro had done, he hit both of the girls, and told them that if “anything happens” to their mother, it would be their fault. At the time, A.C. believed that to be true.

Castro had also physically harmed J.C. in the past, and he had a frequent pattern of physically abusing the children's mother in their presence. Castro later threatened to kill the mother, and take the children, if she went to the police.

The mother finally reported the incident to the police in 2016, after K.C. had been hospitalized in a coma, following an automobile accident. By that time, the mother and Castro were no longer together, and when the mother learned Castro was planning to visit K.C. in the hospital, she contacted the police.

A.C. was then interviewed by a social worker with the Child Abuse Services Team (CAST). During that interview, A.C. offered a long, narrative recollection of what occurred the night Castro forced his way into the bathroom with K.C., spanning several pages of transcript. At one point in her narrative, A.C. stated K.C. told her that during the time she was alone in the bathroom with Castro, "he asked her to take out her shirt and her bra, like, and he started like, touching her chest, . . . I mean her breasts. And . . . then he asked her to like take out her pants slowly. And then I guess she didn't want to and she defended herself. And like, . . . she wanted to do something about it, like hit him like with something. And then I guess she did it so my dad like, bit her fingers and like, right here her chest, right here." During A.C.'s narrative, the interviewer said nothing other than an occasional "Uh-huh" and "Okay," and made no attempt to clarify the details of A.C.'s account.

Eventually, the police interviewed Castro. During that interview, Castro was given the impression K.C. was conscious in the hospital, and that she had disclosed to them what Castro had done to her while they were alone in the bathroom, including that it was he who had taken off her top and attempted to take off her pants. Castro repeatedly denied he had done anything to K.C. in the bathroom, before finally admitting he had: "So . . . yes officer, I admit it. I did do that with my daughter." He explained to the interviewer that he did it because he was looking for a way to get free of the

children's mother: "I didn't want to abuse my daughter and I never did. But I wanted that woman to take me out of her life once and for all, for her to get away from me."

Castro was charged with one count of forcible lewd act on a child under 14, pertaining to the fondling of K.C.'s breasts (Penal Code § 288, subd. (b)(1) (count 1));¹ and one count of assault with intent to commit a sexual offense, pertaining to the attempted removal of K.C.'s pants. (§ 220, subd. (a) and § 288 (count 2).) Although Castro's offenses against K.C. arose out of the same incident in the bathroom, count 1 was alleged to have occurred between January 1, 2009 and November 25, 2011, while count 2 was alleged to have occurred between January 1, 2009 and September 8, 2010.

Castro was also charged with one count of committing a lewd act against his younger daughter, A.C., in an unrelated incident (§ 288, subd. (a) (count 3)), and the prosecution alleged as to counts 1 and 3 that he committed offenses against more than one victim. (§ 667.61, subd. (b) and (e)).

K.C. remained hospitalized throughout the criminal process and did not testify at trial. The court ruled that K.C.'s statements to A.C. in the immediate wake of the bathroom incident were admissible, and thus A.C. description of what K.C. told her— included in both A.C.'s CAST interview and in her trial testimony—were before the jury. A.C. also testified about what she personally saw and heard that night, as did J.C.

The jury found Castro guilty on both of the counts arising out of his attack on K.C. He was acquitted on count 3 involving A.C., and the jury found not true the multiple victim allegation.

Castro was initially sentenced to the upper term of 10 years for count 1, and a consecutive term of 7 years for count 2, for a total term of 17 years. However, those sentences were imposed pursuant to the Chelsea King Child Predator Prevention Act of 2010, which took effect on September 9, 2010 (See, *People v. Soto* (2011) 51 Cal.4th

¹ All further statutory references are to the Penal Code.

229, 237, fn. 4), and it was thus inapplicable to count 2, which was alleged to have occurred no later than September 8, 2010. Consequently, the trial court subsequently reduced Castro's sentence on count 2 to four years, which resulted in a total sentence of 14 years.

DISCUSSION

Section 288, subdivision (b)(1) states that "[a]ny person who commits [a lewd act] by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, is guilty of a felony" Castro's first contention is that there is insufficient evidence he employed force, violence, duress, menace or the threat of immediate or unlawful bodily injury in connection with his lewd act of fondling K.C.'s breasts. While Castro does acknowledge there is evidence he engaged in force against K.C. during the time they were locked together in the bathroom, he contends that all such evidence "related to [his] second act of attempting to pull down K.C.'s pants, when [he] both bit her finger as well as her chest." We disagree.

In assessing the sufficiency of the evidence to support a conviction, "we review the whole record to determine whether . . . [there is] substantial evidence to support the verdict . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." (*In re George T.* (2004) 33 Cal.4th 620, 631.) Instead, reversal is required only if "it appears "that upon

no hypothesis whatever is there sufficient substantial evidence to support [the conviction].””” (*People v. Cravens* (2012) 53 Cal.4th 500, 508.)

Moreover, “[g]iven this court’s limited role on appeal, defendant bears an enormous burden in claiming there is insufficient evidence to sustain his molestation convictions.” (*People v. Veale* (2008) 160 Cal.App.4th 40, 46.) In order to prevail on his substantial evidence challenge, Castro is required to “set forth, discuss, and analyze all the evidence on that point, both favorable and unfavorable.” (*Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218.) That ““cardinal rule of appellate practice”” applies to criminal as well as civil cases (*People v. Martinez* (1966) 239 Cal.App.2d 161, 177), and Castro’s compliance with that “fundamental obligation to this court” is a “prerequisite to our consideration of [the] challenge” (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738.)

1. *Evidence of Force*

Castro’s assertion that there is insufficient evidence he employed force in his lewd act of touching K.C.’s breasts is unpersuasive for at least two reasons. First, as Castro acknowledges, the specific timing of events inside the bathroom where he molested K.C. is “murky” because the only significant witness was 15-year-old A.C., who was testifying from her recollection of what K.C. had described to her eight years earlier. Neither Castro nor K.C. has ever testified as to exactly what occurred between them in that bathroom or how those events played out. The only direct evidence we have from either of them is Castro’s broad admission that he did commit the acts described by the police during his interview, which included removing K.C.’s top.

The “murkiness” of the timeline undermines Castro’s contention that it is clear the force he used against K.C. commenced *after* he had finished fondling her breasts, and it leaves the jury with plenty of room to draw its own inferences based on the surrounding facts.

A.C.'s testimony is that she observed Castro forcing his way into the bathroom with K.C. in the middle of the night, locking the door behind him, and that within minutes K.C. was screaming and crying for help. Although it is possible Castro could have completed his lewd act of fondling K.C.'s breasts during the moments before she started screaming, that is not the only reasonable inference to be drawn from A.C.'s testimony.

Significantly, there is no evidence establishing how much time passed between Castro's entry into the bathroom and his commencement of that initial lewd act. The jury could therefore reasonably infer that those first few minutes in which K.C. was quiet came *before* Castro had made his lewd intentions clear to her. Stated another way, the jury could reasonably conclude that resisting and screaming were K.C.'s *immediate* response to Castro's demand that she remove her top.

The conclusion that K.C. resisted Castro's effort to fondle her breasts is reinforced by three other pieces of evidence. First, A.C. testified that K.C. responded to Castro's request that she remove her clothing by saying "no." Second, Castro acknowledged in his police interview that it was he, rather than K.C., who actually removed her top. And third, one of the places Castro forcibly bit K.C. was *on the breast*.² An obvious inference would be that he did so during the time his lewd intent was focused on K.C.'s breasts, rather than during his later effort to remove her pants.

The second problem with Castro's argument is that the evidence he relies upon in claiming a clear demarcation between K.C.'s reaction to his lewd touching of her

² Castro's summary of the evidence omits any reference to the fact K.C. said "no" when he asked her to remove her top, and the fact that it was he who removed it. Instead, he claims "the only evidence [A.C.] testified to regarding the first incident was that [K.C.] had told her that he had asked her to take off her blouse. She complied and he touched her breasts." As we have already pointed out, Castro effectively forfeits his substantial evidence challenge by ignoring that unfavorable evidence. (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738.)

breasts and to his subsequent attempt to forcibly remove her pants does not prove his point.

In support of his argument, Castro relies on two pieces of evidence: A.C.'s response at trial to the question "[w]hat did your sister tell you happened after your father touched her bare breasts?" and A.C.'s earlier description of what K.C. told her about the incident in her CAST interview. But neither piece of evidence irrefutably demonstrates K.C. remained passive during Castro's touching of her breasts, as he would have us believe.

In response to the question about what K.C. told her had happened after Castro touched her breasts, A.C. said "[t]hat she was really angry and, like, she couldn't believe that he—he was doing that to her." While Castro interprets that testimony as reflecting K.C. "got angry" only "[a]fter he touched her breasts," that is not what A.C. said. To the contrary, her statement suggests K.C. was already angry *while* Castro was touching her breasts—i.e., that K.C.'s anger sprung from her contemporaneous disbelief "that he . . . was doing that to her."

And in A.C.'s narrative response to the CAST interviewer, she stated that K.C. told her that Castro "asked her to take out [sic] her shirt and her bra, like, and he started like, touching her chest, . . . I mean her breasts. And . . . then he asked her to like take out [sic] her pants slowly. And then I guess she didn't want to and she defended herself." Although that simple description of what occurred does not mention K.C. defending herself until after it reveals Castro had asked her to take off her pants, A.C. does not specifically say that K.C. did not engage in any defensive efforts earlier. In fact, it says nothing at all about what occurred between the time Castro "asked [K.C.]" to take off her top and when he "started . . . touching . . . her breasts." And based on A.C.'s subsequent trial testimony, we know that, at a minimum, K.C. refused Castro's initial request, and thus that A.C.'s description of those events in the CAST interview was incomplete.

Further, A.C.'s description of K.C.'s self-defense directly links it to the fact K.C. *did not want to do what Castro was asking*. Because other evidence demonstrates K.C. did not want to take off her top when Castro asked her to, the statement actually supports the inference that K.C.'s self-defense effort would likely have commenced during Castro's unwanted fondling of her breasts.

Based on the foregoing, we reject Castro's assertion the evidence is undisputed that K.C. did not begin actively resisting his molestation efforts until after he fondled her breasts. After considering the evidence as a whole, we conclude the evidence is sufficient to support the conclusion that K.C. did resist him from the beginning, and that Castro responded by employing force, including during the time he was trying to touch her breasts.

2. *Evidence of Duress*

Even if we were persuaded by Castro's assertion there was insufficient evidence he engaged in force in connection with his lewd touching of K.C.'s breasts, we would conclude there was sufficient evidence he employed duress in doing so.

Duress, for purposes of lewd acts with a child, refers to whether the perpetrator has engaged in coercion in connection with the lewd act. "[D]uress,' as used in section 288(b)(1), means "'a direct or implied threat of force, violence, danger, *hardship* or retribution sufficient to coerce *a reasonable person of ordinary susceptibilities* to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.'"" (*People v. Soto* (2011) 51 Cal.4th 229, 246.)

And because duress involves psychological coercion, it "can arise from various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes. [Citations.] 'Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and

his continuous exploitation of the victim' is relevant to the existence of duress.” (*People v. Schulz* (1992) 2 Cal.App.4th 999, 1005; *People v. Superior Court (Kneip)* (1990) 219 Cal.App.3d 235.) ““Other relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that revealing the molestation would result in jeopardizing the family.”” (*People v. Veale* (2008) 160 Cal.App.4th 40, 46.)

If there is such evidence, “[i]t was for the jury to determine whether a reasonable adolescent in [the victim’s] position would have been coerced.”” (*People v. Leal* (2004) 33 Cal.4th 999, 1010.)

Castro acknowledges that his status as K.C.’s father, and his position of dominance in her life, are both relevant in assessing whether he subjected her to duress, but contends those factors are insufficient, standing alone, to support that finding, citing *People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1291-1293, and *People v. Hecker* (1990) 219 Cal.App.3d 1238, disapproved of on another ground in *People v. Soto*, *supra*, 51 Cal.4th at p. 248, fn. 12.) While we might agree generally, we reject Castro’s underlying premise that there is no other evidence supporting a finding that he employed duress as to K.C.³ To the contrary, the circumstances here convince us that he did.

It is undisputed that Castro perpetrated his crimes on his young daughter when she awoke in the middle of the night needing to use the restroom. As such, she was in an obviously vulnerable position. The jury could reasonably infer Castro knew that when he followed her and forced his way into the restroom. He then closed the door

³ Here again, Castro has failed to summarize all the evidence bearing on the issue. To argue the evidence is insufficient on the point, without acknowledging that it includes the fact he took advantage of 12-year-old K.C.’s need to use the restroom to trap her alone in a small room in the middle of the night is striking. Castro’s failure to comply with that “fundamental obligation to this court” also justifies a rejection of the claim. (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738.)

behind him and locked it, trapping her with him in that small space. That environment is inherently coercive.

And when we add the fact that K.C. knew Castro had a history of physically abusing her mother, and of using physical force against her brother, it is easy to see how she likely felt she had no option other than to acquiesce to whatever Castro wanted her to do.

Castro suggests the evidence of his past abuse of K.C.'s mother and brother is irrelevant because there is no evidence he had ever physically abused K.C., and she would therefore have had no reason to fear him. We disagree. Any person who is suddenly trapped against her will in an enclosed space by a person she knew to be violent in the past might reasonably fear violence. When the person trapped is a 12-year-old girl and the violent person is her father, it would be extraordinary if she did not anticipate impending violence.

Finally, the fact that K.C.'s initial response to Castro's demand that she remove her top was to say "no" provides additional support for the inference she was operating under duress. She was not a willing participant as Castro managed to remove both her top and her bra before fondling her bare breasts. If he did not actually use force to accomplish those things, the jury could easily infer that K.C. complied only because she reasonably felt she had no choice under the circumstances. In other words, she was acting under duress. That call was surely the jury's to make, and we conclude the evidence amply supported such a finding.

3. Resentencing on the Forcible Lewd Act

In his supplemental brief, Castro also contends the court erred by sentencing him on the count of forcible lewd act (count 1) pursuant to the Chelsea King Child Predator Prevention Act of 2010 (the sentencing Act), which became effective in

September 2010. (*People v. Soto, supra*, 51 Cal.4th at p. 237, fn. 4) The Attorney General concedes this was error, and we agree.

As alleged in the information, the offense in count 1 was committed “between January 1, 2009 and November 25, 2011,” which theoretically allows for the possibility it took place after the effective date of the sentencing Act. However, “it is the prosecution’s responsibility to prove to the jury that the charged offenses occurred on or after the effective date of the statute providing for the defendant’s punishment” (*People v. Hiscox* (2006) 136 Cal.App.4th 253, 256.) In this case, the consensus is the offense was committed during 2009, before the sentencing Act took effect. Consequently, it was error for the court to rely on the sentencing Act in determining Castro’s sentence on his conviction on count 1, alleging his commission of a forcible lewd act.

DISPOSITION

We affirm the judgment related to Castro’s convictions. We reverse his sentence on count 1, and remand the case to the trial court for resentencing under the law in effect in 2009.

GOETHALS, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.